Michael K. Jeanes, Clerk of Court
*** Filed ***
03/25/2013 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-102557-001 DT 03/21/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

ANDREW A ALHELM (001)

KRISTEN M CURRY

REMAND DESK-LCA-CCC
SAN TAN JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2012–102557.

Defendant-Appellee Andrew Alhelm (Defendant) was charged with driving under the influence in the San Tan Justice Court. Plaintiff-Appellant the State of Arizona contends the trial court erred in dismissing the charges with prejudice. For the following reasons, this Court vacates the order of the trial court.

I. FACTUAL BACKGROUND.

On December 12, 2011, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and improper left turn, A.R.S. § 28–751(2). On January 31, 2012, Defendant appeared in court and was released on his own recognizance. On February 7, Defendant's attorney filed a Notice of Appearance and Not Guilty Plea. On March 7, Defendant's attorney filed a Motion To Continue, which the trial court granted and continued the pretrial to April 18. On April 18, Defendant's attorney filed another Motion To Continue, which the trial court granted and continued the matter for a Status Conference on May 9, and a jury trial on May 18.

On April 27, 2012, Defendant filed a Motion To Dismiss contending he asked to speak to an attorney before submitting to a BAC test, but the officer would not allow him to do so. On May 9, the State filed a Response to Defendant's Motion To Dismiss, contending the following. Officer Jaime O'Connell arrested Defendant for DUI and read him the *Miranda* warnings, whereupon Defendant said he would not answer any questions. Defendant kept trying to explain to Officer O'Connell why he did not do the one-leg-stand test, but Officer O'Connell said he was not going to talk to Defendant because he had invoked his right to remain silent. Officer O'Connell read to Defendant the Admin Per Se/Implied Consent Affidavit, and Defendant asked Officer O'Connell if he would suspend Defendant's license if he spoke to an attorney. Officer

O'Connell told Defendant he would not suspend his license if he spoke to an attorney and asked Defendant if he wanted to talk to an attorney. Defendant said he would submit to the test, and was willing to provide a blood sample as long as Officer O'Connell did not ask him questions about the DUI.

On May 9, 2012, the State filed a Motion To Continue because the officer was out of town. Defendant's attorney objected to the continuance, and the trial court set an evidentiary hearing for May 16 and affirmed the trial date of May 18.

On May 16, 2012, the prosecutor made an oral motion to dismiss because Officer O'Connell was not present. (R.T. of May 16, 2012, at 3.) Defendant's attorney asked the dismissal to be with prejudice. (*Id*.) The following exchange took place:

> THE COURT: . . . The case law specifically states where issues of right to counsel exist, dismissal with prejudice is the only remedy.
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> MS. ESCALANTE: Right, Your Honor. But because those have not been litigated and there has been no finding that there was indeed a right to counsel issue—.
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> THE COURT: That's right. We haven't had the hearing yet.
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> MS. ESCALANTE: —there is no finding of that at this point. So the appropriate dismissal would be without prejudice.

(R.T. of May 16, 2012, at 3–4.) The prosecutor stated case law provides preclusion of evidence is the proper remedy when there is an interference with the right to counsel. (*Id*. at 8.) The trial court said, "I'm aware of that particular line of thinking and really I don't agree with it." (*Id*.)

Defendant's attorney said Defendant was present and was prepared to testify. (R.T. of May 16, 2012, at 4.) The trial court explained:

> THE COURT: Let me explain what my hesitation is about. I will dismiss it this afternoon, certainly. But I can't make a finding with regard to your motion to dismiss without hearing testimony. And while we do have your client here this afternoon I assume, we don't have the State's officer, so—

(R.T. of May 16, 2012, at 5.) Defendant's attorney said Defendant would testify, and because the officer was not present, Defendant's testimony would be uncontroverted, so the trial court could find a violation of the right to counsel and dismiss the matter with prejudice. (*Id*. at 5–6.) The prosecutor said "before any of that occurs I'm still moving to dismiss without prejudice." (*Id*. at 6.) Defendant's attorney then contended the State was moving to dismiss to circumvent the Rule 8 time limits. (*Id*.) The trial court further explained:

> THE COURT: I'm going to dismiss this afternoon. That's the third time I said it. But the issue right now is whether I am going to do it with or without prejudice. And I can't make a decision about that until I hear some testimony with regard to counsel's allegations of denial of right to counsel.

(R.T. of May 16, 2012, at 7.) Defendant's attorney told the trial court they could "save time" because Defendant "is going to testify what is in my motion," so the trial court could just rule on the pleadings without hearing testimony. (*Id*.) The prosecutor said she would not stipulate to the facts in Defendant's attorney's motion. (*Id*. at 8.) The trial then ruled as follows:

> THE COURT: . . . It is the opinion of this Court that based on a reading of the pleadings, without having taken any testimony that the motion to dismiss with prejudice is appropriate.

(R.T. of May 16, 2012, at 8.) The following exchange then took place:

> MS. ESCALANTE: You took judicial notice of the pleadings over the State's objection; correct?
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> THE COURT: If that's your position, yes, ma'am, that there are statements of fact in both sets of pleadings, the motion and the response.
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> MS. ESCALANTE: Okay.
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> THE COURT: Thank you.
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> MS. ESCALANTE: And you took the statements of fact that were purported in defense counsel's motion, but not the State's; correct?
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> THE COURT: I found them more persuasive.

(R.T. of May 16, 2012, at 9.) On May 18, 2012, the State filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Did the trial court make the necessary finding for a dismissal with prejudice.*

The State contends the trial court erred in dismissing this case with prejudice. An appellate court reviews an order granting a motion to dismiss for an abuse of discretion or for the application of an incorrect legal interpretation. *State v. Lemming*, 188 Ariz. 459, 460, 937 P.2d 381, 382 (Ct. App. 1997). A trial court abuses its discretion when the record fails to provide substantial support for the trial court's decision or the trial court commits an error in law in reaching its decision. *State v. Cowles*, 207 Ariz. 8, 82 P.3d 369, ¶ 3 (Ct. App. 2004). The first question is whether the trial court complied with the requirements of Rule 16.6(d), which provides as follows:

> **d. Effect of Dismissal.** Dismissal of a prosecution shall be without prejudice to commencement of another prosecution, unless the court order finds that the interests of justice require that the dismissal be with prejudice.

Rule 16.6(d), ARIZ. R. CRIM. P. This Rule requires a specific finding that the delay would cause prejudice, and the mere rote recitation into the record that the dismissal is in the interests of justice will not suffice to meet the requirement of this rule:

> The state argues that the trial court abused its discretion in granting dismissal with prejudice because the trial court made no specific finding that a delay in prosecution would prejudice the defendant in this case and because the record itself does not reveal that dismissal without prejudice would result in any articulable prejudice to defendant. The state relies on *State v. Gilbert* for its contention that the type of cursory finding made by the trial court in this case, without more, is insufficient to support a conclusion that dismissal with prejudice is, in fact, in the interests of justice. We agree.
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> . . . .
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> We agree with defendant that the record in this case reflects the trial court's awareness of our rulings in *Gilbert* and *Garcia* that the mere lapse of a set amount of time is not sufficient by itself to support a dismissal with prejudice. However, we find that the trial court overlooked our additional holding that Rule 16.5 requires a trial court to make a "reasoned finding" that the interests of justice require the dismissal to be with prejudice. We agree with the state that a "reasoned finding" demands more of a trial court than the rote recitation into the record of the legal incantation "interests of justice" in order to meet the requirements of Rule 16.5. In our opinion, the rule requires the trial court to state on the record its reasons for concluding that dismissal with prejudice is in the interests of justice. This statement must be based on a particularized finding that to do otherwise would result in some articulable harm to the defendant. Therefore, we hold that the trial court's perfunctory statement that the "interests of justice" required dismissal with prejudice in this case does not constitute the "reasoned finding" required by Rule 16.5(d) to support dismissal with prejudice.

State v. Wills, 177 Ariz. 592, 594, 870 P.2d 410, 412 (Ct. App. 1993) (citations omitted). In the present matter, the trial court did not even make a rote recitation in the record; to the contrary, the trial court made no finding at all "that the interests of justice require that the dismissal be with prejudice." Because the trial court failed to make the required finding, the trial court's dismissal had to be without prejudice.

Cases have held the failure to state specifically the dismissal with prejudice is in the interests of justice is not fatal as long as the record shows the trial court considered the interest of justice in making its decision. *State v. Granados*, 172 Ariz. 405, 407, 837 P.2d 1140, 1142 (Ct. App. 1991); *State v. Garcia*, 170 Ariz. 245, 247, 823 P.2d 693, 695 (Ct. App. 1991). In the present matter, however, neither the trial court nor Defendant's attorney nor the prosecutor ever mentioned the phrase "interests of justice." Moreover, because the prosecutor made an oral motion to dismiss and Defendant's attorney responded orally, there was nothing in any written motion arguing why a dismissal with or without prejudice was or was not in the interests of justice. The question then is whether the record reveals sufficient reasons for dismissal with prejudice.

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B. *Did the trial court either err as a matter of law or abuse its discretion in dismissing the case with prejudice.*

Cases have held a dismissal with prejudice is justified if the State caused an intentional delay to harass or gain a tactical advantage or avoid the speedy trial requirements of Rule 8. *State v. Gilbert,* 172 Ariz. 402, 405, 837 P.2d 1137, 1140 (Ct. App. 1991), *citing State v. Hall,* 129 Ariz. 589, 592–93, 633 P.2d 398, 401–02 (1981) ("For pre-indictment delay to violate due process, the appellants must show that the delay was intended to gain a tactical advantage or to harass them and that the delay actually and substantially prejudiced them."). Defendant's attorney did argue to the trial court "all that [this] is doing is circumventing Rule 8 time." (R.T. of May 16, 2012, at 6.) For four reasons, Defendant's claim of a potential Rule 8 problem does not support the trial court's granting the motion to dismiss with prejudice.

First, under Rule 16.6(a), a trial court may not grant a prosecutor's motion to dismiss if the purpose of the motion is to avoid the provisions of Rule 8:

> Rule 16.6(a) does not require a trial court to dismiss charges with prejudice if it finds the purpose of the state's motion is to avoid the provisions of Rule 8. Indeed, a court may only dismiss with prejudice if "the interests of justice" require it. Ariz. R. Crim. P. 16.6(d). Instead, ***if the court concludes the state is attempting to avoid Rule 8, the court must deny the motion to dismiss altogether.*** See Ariz. R. Crim. P. 16.6(a) ("The court, on motion of the prosecutor showing good cause therefor, may order that a prosecution be dismissed at any time upon finding that the purpose of the dismissal is not to avoid the provisions of Rule 8.").

State v. Paris-Sheldon, 214 Ariz. 500, 154 P.3d 1046, ¶ 23 (Ct. App. 2007) (emphasis added). Thus, if the trial court had found a potential Rule 8 violation, it should have denied the motion to dismiss rather than granting it with prejudice.

Second, Defendant failed to show the Rule 8 time limits were about to expire. Defendant first appeared in court on January 31, 2012, and he was released from custody, which meant his trial had to commence in 180 days, or by July 29, 2012. On March 7 and April 18, Defendant's attorney filed two motions to continue, which the trial court granted and continued the matter for a Status Conference on May 9, when the State filed its motion to continue. Thus, as of May 16, only 43 days had expired (1/31 to 3/07 = 36 days; 5/09 to 5/16 = 7 days), which meant 137 days remained, so the last day was September 30, 2012. The State therefore was not facing an impending Rule 8 deadline.

Third, the mere passage of an arbitrary time limit is not sufficient to warrant dismissal of a case with prejudice. *Wills,* 177 Ariz. at 594, 870 P.2d at 412. Instead, the defendant must show how the delay in the proceedings would cause actual prejudice. *Gilbert,* 172 Ariz. at 405, 837 P.2d at 1140; *Garcia,* 170 Ariz. at 248, 823 P.2d at 696.

Fourth, Defendant failed to show how continuing this matter, even to the last day of September 30, 2012, would have caused actual prejudice. "The most important factor to consider in whether a dismissal should be with or without prejudice is whether delay in the prosecution will result in prejudice to the defendant." *Gilbert*, 172 Ariz. at 404, 837 P.2d at 1139. In order to show prejudice, Defendant had to show the "dismissal[] actually hurt [his] ability to defend against the charges." *Gilbert*, 172 Ariz. at 405, 837 P.2d at 1140. The usual claim is that a "delay can result in prejudice because memories dim and evidence is lost." *Granados*, 172 Ariz. at 407, 837 P.2d at 1142. At a hearing on Defendant's motion to dismiss based on his claim of interference with counsel, the only persons who would be testifying would be Defendant and Officer O'Connell, and Defendant made no claim that his memory would be dimming in the next 137 days. To the extent Officer O'Connell's memory might have dimmed in that time, that could only have helped Defendant. And the only evidence that could be lost was Defendant's blood sample and the testing results, and again, the loss of that evidence could only have helped Defendant. Defendant thus failed to show how any delay past May 16, 2012, would have prejudiced him.

A possible claim of prejudice is that, if the State were permitted to refile the charges, the trial court would have to hold a hearing on Defendant's Motion To Dismiss, at which time Officer O'Connell could testify, with a possible result that trial court may find there was in fact no violation of the right to counsel, which may mean Defendant would be found guilty and punished. As noted above, prejudice requires a showing that the "dismissal[] actually hurt [his] ability to defend against the charges." *Gilbert*, 172 Ariz. at 405, 837 P.2d at 1140. Prejudice means the defendant was unable to prepare properly, not that the defendant faced increased punishment. *State v. White*, 118 Ariz. 279, 280, 576 P.2d 138, 139 (Ct. App. 1978) (filing of allegation of prior conviction 19 days prior to date set for trial did not prevent defendant from preparing properly); *In re Arnulfo G.*, 205 Ariz. 389, 71 P.3d 916, ¶¶ 9, 13 (Ct. App. 2003) (type of harm that will justify dismissal with prejudice is harm that would actually impair juvenile's ability to defend against charges, not that juvenile would be tried as adult and face adult punishment); *State v. Vaughn*, 124 Ariz. 163, 164–65, 602 P.2d 831, 832–33 (Ct. App. 1979) (state filed allegation of prior conviction promptly upon verification).

As noted above, dismissal with prejudice is justified if the State caused an intentional delay to harass or gain a tactical advantage. The record shows the prosecutor was asking for the delay because, for reasons unbeknownst to the prosecutor, Officer O'Connell did not appear for the May 16, 2012, hearing. Defendant thus failed to show the delay was either intentional or to harass or to gain a tactical advantage. *See State v. Rasch*, 188 Ariz. 309, 312, 935 P.2d 887, 890 (Ct. App. 1996) (prosecutor's failure to inform victim of defense counsel's request for interview was inadvertent; because trial court found no prosecutorial misconduct, it erred in dismissing with prejudice).

The reason the trial court did discuss was Defendant's contention that Officer O'Connell interfered with his right to consult with counsel. For two reasons, that contention would not support a dismissal with prejudice.

First, as discussed above, the interests of justice inquiry focuses on the reasons for the asking for the delay (which in this case was the non-appearance of Officer O'Connell), and the potential that any ***delay*** would result in prejudice to the defendant (for which in this case Defendant failed to show). Whether or not Officer O'Connell interfered with Defendant's right to consult with counsel was a separate inquiry, and thus was not a proper reason to make the granting of the prosecutor's motion to dismiss be with prejudice.

Second, assuming a finding of interference with Defendant's right to consult with counsel would be a proper reason to make the granting of the prosecutor's motion to dismiss be with prejudice, the record does not contain any evidence to support a finding that Officer O'Connell in fact interfered with Defendant's right to consult with counsel. In the present matter, the trial court took no testimony, thus there is no evidence in the record to support a finding of interference with the right to consult with counsel. The Arizona Supreme Court has held a trial court must resolve conflicting issues on the basis of evidence presented and not merely on the pleadings of the parties:

> In order to substantiate an entrapment defense, counsel for Budwit filed a motion to produce the identity of an informant and to produce the informant for pretrial investigation. . . . The state opposed the motion for disclosure and a hearing was held. Based upon the ***memoranda filed and argument of counsel*** at the hearing, the trial judge ordered the state to disclose the informant's name and address to defense counsel and also ordered defense counsel not to reveal the informant's identity to anyone else.
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> From the sparse record created in the court below, we are simply unable to offer any opinion with respect to the correctness of the trial judge's ruling. There was no evidence offered at the hearing which could provide the basis for a ruling on the disclosure question.
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> In order to overcome the public policy protecting the government's privilege against disclosing the identity of a confidential informant, the burden is on the defendant to establish that the informant could testify on the merits of the case.
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> . . . .
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> In order to strike that balance [between the public interest in protecting the flow of information against the individual's right to prepare his defense], the trial court must have before it evidence supporting each side's allegations. ***Argument of counsel is not evidence.*** Among other things, sworn affidavits, stipulated facts, depositions, and oral testimony might be introduced to support a claim of disclosure or to counter such a claim. The record here is devoid of evidence; therefore, there is nothing before this court by which we can review the trial court's ruling nor was there anything before the trial court upon which to base its ruling. We vacate the order of disclosure without prejudice to the defendant's right to re-urge the motion based upon the proper presentation of evidence in the trial court.

State v. Grounds, 128 Ariz. 14, 14–15, 623 P.2d 803, 803–04 (1981) (emphasis added; citations omitted). Defendant's attorney noted Defendant was present and could have testified and given his version of what had happened. If Defendant had testified, the record might have supported a finding of interference with the right to consult with an attorney, but Defendant did not testify. This Court must resolve these issues based on what actually happened at the hearing below and not on speculation of what might have been if only things had been done differently.

III. CONCLUSION.

Based on the foregoing, this Court concludes (1) the trial court failed to comply with the requirements of Rule 16.6(d), (2) nothing in the record showed a delay would cause prejudice to defendant's ability to defend against the charges, (3) the trial court erred in basing its decision to dismiss with prejudice on its conclusion of interference with the right to consult with counsel, and (4) the trial court erred in making its conclusion of interference with the right to consult with counsel based on the pleadings filed by the attorneys and not upon live testimony and evidence presented at a hearing. This Court must therefore vacate the trial court's order and remand this matter to the trial court. *In re Arnulfo G.* at ¶ 14 (remanded with direction to enter order dismissing without prejudice); *Rasch*, 188 Ariz. at 313, 935 P.2d at 891 (judgment of dismissal affirmed but modified by vacating phrase "with prejudice"); *Wills*, 177 Ariz. at 595, 870 P.2d at 413 (order dismissing with prejudice vacated and remanded with directions to enter order dismissing without prejudice); *Granados*, 172 Ariz. at 408, 837 P.2d at 1143 (order dismissing charge with prejudice vacated, leaving intact dismissal without prejudice); *Gilbert*, 172 Ariz. at 405, 837 P.2d at 1140 (order dismissing charge with prejudice vacated, leaving intact dismissal without prejudice); *Garcia*, 170 Ariz. at 248, 823 P.2d at 696 (order dismissing charge with prejudice vacated, leaving intact dismissal without prejudice).

IT IS THEREFORE ORDERED vacating the ruling of the San Tan Justice Court dismissing the charges with prejudice.

IT IS FURTHER ORDERED remanding this matter to the San Tan Justice Court with directions to enter its order dismissing the charges without prejudice.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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